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No. 90-1971

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FEDERAL INSURANCE CO.,
Petitioner,

v.

SUSQUEHANNA BROADCASTING CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the judgment of the courts below, based on Pennsylvania law, that petitioner has a duty to defend and indemnify respondent under liability insurance policies with respect to proceedings to investigate and remedy pollution pursuant to the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9601 *et seq.*, conflicts with and is preempted by that Act.

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Comprehensive Environmental Response Compensation and Liability Act:
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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Susquehanna Broadcasting Co. ("SBC")[1] files this Brief in Opposition to the Petition for a Writ of Certiorari by Petitioner Federal Insurance Company ("Federal").[2]

COUNTERSTATEMENT OF STATUTES AND REGULATIONS INVOLVED

Contrary to Federal's statement of the statutes and regulations involved, the questions presented in this case

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[1] Pursuant to Rule 29.1 of this Court, SBC states that it is a closely held corporation with no subsidiaries or affiliates that have publicly traded shares outstanding.

[2] As used herein, "PA" refers to the Appendix to the petition ("Pet.") and "JA" refers to the Joint Appendix filed in the Court of Appeals. For the convenience of the Court, a copy of the Joint Appendix and Federal's Reply Brief in the Court of Appeals have been lodged with the Clerk.

involve the interpretation of insurance agreements under Pennsylvania common law. They are not governed by the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*, nor any other federal or state statute or regulation.

COUNTERSTATEMENT OF THE CASE

This case arises out of actions by private plaintiffs and by the U.S. Environmental Protection Agency ("EPA") under CERCLA against Westinghouse Electric Corp. ("Westinghouse") to impose liability for investigating, cleaning up, and otherwise responding to alleged pollution.[3] After Westinghouse sued SBC for contribution and indemnity as to the claims against it, Federal initially agreed to defend SBC under several comprehensive general liability ("CGL") and excess/umbrella liability policies Federal had issued to SBC since 1964. Federal also paid SBC's liability (under a settlement) to the private plaintiffs.

In March 1988, Federal terminated its defense of SBC against Westinghouse and brought a declaratory judg-

[3] The underlying CERCLA actions arise from the discovery in the early 1980's of contamination at several sites in the Gettysburg area, including a Westinghouse plant and two rural sites at which an independent contractor, Frederick Shealer, disposed of waste for a period of years for Westinghouse as well as SBC (starting in 1975) and other private parties. Because of that discovery, EPA, under CERCLA, required Westinghouse to investigate the contamination. In addition, residents and property owners in the vicinity of the sites sued Westinghouse and Shealer under CERCLA and Pennsylvania statutes and common law, seeking to recover for alleged bodily injuries and property damage caused by the contamination. Westinghouse thereafter impleaded SBC and others who used Shealer and sought a money judgment against them for contribution and for indemnity as to all or a portion of its financial liabilities to EPA and the resident plaintiffs. The resident plaintiffs then cross-claimed against SBC and the other third-party defendants, who also counterclaimed against Westinghouse. All of the underlying claims concerning SBC have been settled.

ment action in the Middle District of Pennsylvania under the district court's diversity jurisdiction. Raising no federal question, Federal sought a ruling that under the terms of its liability policies Federal was not obligated to defend or indemnify SBC with respect to Westinghouse's claims.[4]

The specific issues raised by Federal's claims in this case were delineated in a stipulated order (JA at A51, A54): (1) whether costs incurred in proceedings to investigate and remediate pollution under CERCLA were "damages" under the CGL and excess policies Federal issued to SBC;[5] and (2) whether coverage was precluded by the so-called "pollution exclusion" contained in some of those policies.[6] In support of its motion for summary judgment, Federal contended that the court's interpretation of the policy language on the "damages" issue should take account of the asserted CERCLA policy of "internalizing" environmental costs (Fed. Mem. in Support of Motion for Summary Judgment at 13). Federal did not contend that there was a conflict between the allowance of coverage and the provisions of CERCLA so that CERCLA precluded an application of state law under which CERCLA response costs were covered "damages."

Based on its interpretation of Pennsylvania law, the district court granted summary judgment for SBC and

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[4] Federal also sought restitution from SBC of those defense costs it had incurred prior to terminating its defense of SBC with respect to Westinghouse's third-party claims.

[5] Under these policies Federal is obliged to indemnify SBC for "all sums which the insured [SBC] shall become legally obligated to pay as damages because of bodily injury or property damage" (JA A235). Federal is also required "to defend any suit . . . seeking damages on account of such bodily injury or property damage" (*id.*).

[6] Those policies excluded coverage for intentional pollution but covered contamination which was "sudden and accidental" (JA at A254).

held that Federal had a duty to defend and indemnify SBC under the policies in force in 1975, when SBC's disposal began (PA at A19).[7] The district court's opinion did not discuss Federal's reference to CERCLA policy. Federal filed no post-judgment motion. Moreover, in responding to a post-trial motion by SBC,[8] Federal sought reconsideration of the court's interpretation of Pennsylvania law, but did not argue that the court's ruling conflicted with or was preempted by CERCLA.

Both parties appealed to the Court of Appeals for the Third Circuit.[9] Federal did not raise as an issue on appeal any contention that a construction of the policies in favor of coverage as a matter of state law would conflict with or be preempted by CERCLA.[10] While Federal

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[7] The district court found it unnecessary to decide the questions raised as to the applicability of the pollution exclusion, and whether it first appeared in 1976 or 1977, but went on to make "observations" on the pollution exclusion suggesting that it did not apply to "gradual" pollution (PA A13-A18).

[8] The district court had initially limited the "damages" SBC could recover to "the value of the property" (PA at A11). SBC filed a motion pursuant to Rule 59, Fed. R. Civ. P., requesting that the district court reconsider and amend its judgment insofar as it imposed limitations on Federal's duty to indemnify SBC. The district court granted SBC's motion by removing the "property value" limitation, which Federal had agreed was erroneous (PA at A20).

[9] SBC appealed from the district court's failure to decide that the pollution exclusion first appeared in 1977, from its observations concerning that exclusion, and from its denial of SBC's request for attorney fees.

[10] In both its civil appeal information statement and the statement of issues in its opening brief, required by Fed. R. App. P. 28(a)(2) and Third Cir. R. 21(1)(A)(d), Federal limited its issues on appeal to whether, under Pennsylvania law: the terms of the policies can be interpreted to provide coverage; if so, when that coverage was triggered (a question Federal had not raised in the district court); whether coverage for "response costs" is limited to the value of the property (although Federal had agreed that such a limitation was erroneous); and whether a settlement agreement between the resi-

did again allude to the alleged "internalization" of costs goal of CERCLA (Fed. Appeal Br. at 18), Federal also did not argue in any of its appellate briefs that the district court's decision in favor of coverage under state law conflicted with or was preempted by CERCLA. To the contrary, Federal argued that "[t]his case is about contract language" (Fed. Reply Br. at 5).

Further, in responding to a claim that public policy favored coverage, as evidenced by the widespread support for policyholders in similar cases through amicus briefs by states and the Department of Justice, Federal submitted and relied on the recent congressional testimony of the Assistant Administrator for Enforcement at EPA, primarily responsible for enforcing CERCLA. His testimony presented the federal government's view that these insurance coverage questions concerning CERCLA liability are governed entirely by state law:

> [t]he question whether an insurer is required to indemnify its insured against Superfund liability turns on the interpretation of the private insurance contract entered into by those parties; typically, the Comprehensive General Liability ("CGL") insurance policy is the instrument used to protect commercial entities against various types of liability. *Although CERCLA provides that certain categories of parties are to be held liable for hazardous substance contamination, the statute leaves the interpretation of insurance policies to state law. No special rules apply when construing insurance policies merely because the underlying liability arises as a result of CERCLA.* [Fed. Reply Br. at 20 and Exh. E at 7; emphasis added].

Federal also relied upon a letter from the Assistant Attorney General of the United States to a House Com-

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dent plaintiffs and SBC and the other third party defendants had extinguished Westinghouse's claims against SBC (a claim the district court had rejected (PA at A18)).

mittee endorsing the EPA testimony and explaining that the United States had filed an amicus brief in one case because it believed that the Eighth Circuit had "incorrectly interpreted Missouri law" in holding that "damages" should not be construed to include CERCLA response costs (*id.* at Exh. D at 2). The letter, which referred to the appeal in this case, in no way suggested that a correct interpretation of state law as providing such coverage would conflict with or be preempted by CERCLA.

By judgment order dated February 22, 1991, the Third Circuit affirmed without opinion the district court's judgment. Federal filed a petition for rehearing and suggestion of rehearing en banc, in which it raised no issue concerning any conflict between the judgment in this case and CERCLA. Rather, the only questions identified by Federal as important or otherwise warranting rehearing were questions of state law. On March 28, 1991, the Court of Appeals denied Federal's petition.

REASONS FOR DENYING THE PETITION

The petition should be denied because (1) the question presented by Federal was not raised in or addressed by the court below; (2) the question presented has not given rise to a conflict with any decision of this Court or any other appellate court, and (3) Federal erroneously contends that an interpretation of state law permitting insurance coverage for environmental contamination allegedly caused by an insured conflicts with or is preempted by CERCLA.

I. THE QUESTION PRESENTED TO THIS COURT BY FEDERAL WAS NOT RAISED IN THE COURT BELOW

In the court of appeals, Federal chose to litigate solely with respect to questions of state insurance contract law. Having lost twice on those questions, Federal now seeks to present a federal question—that the judgment finding

coverage conflicts with and is presumably preempted by CERCLA—as a vehicle for review by this Court. However, absent extraordinary circumstances not present here, this Court will not grant certiorari to review a question that was not squarely presented to the court of appeals and necessarily decided by that court's judgment. *Cf., e.g., EEOC v. Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986); *Miree v. DeKalb County*, 433 U.S. 25, 34 (1977). *See also Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (where petition presents question that "was not raised in the Court of Appeals," that question "is not properly before us").

As set forth in the counterstatement of the case, at no point did Federal contend in the court of appeals that the district court's judgment in SBC's favor conflicted with or was overridden by CERCLA—the sole issue Federal seeks to raise before this Court. To the contrary, Federal expressly stated that the case was only about the meaning of contract language. Further, it relied upon statements by EPA and the Justice Department that the question before the courts in this and like cases was governed solely by state contract law.

Moreover, as the court of appeals merely entered a judgment order affirming the district court's judgment, without any opinion, there is no basis for contending that the court of appeals ruled against a claim that Federal did not purport to make.[11] In any event, given the absence of an opinion of either court below addressing the question Federal now presents, this case would not be a

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[11] The court of appeals' affirmance is not necessarily an implicit rejection of Federal's claim of conflict with CERCLA, for the affirmance could have been based on the familiar rule that an appellate court need not address issues not squarely and timely raised by a party. *E.g., Brenner v. Local 514, United Bhd. of Carpenters*, 927 F.2d 1283, 1298 (3d Cir. 1991); *Jackson v. University of Pittsburgh*, 826 F.2d 230, 237 (3d Cir. 1987), *cert. denied*, 484 U.S. 1020 (1988); *Battle v. Pennsylvania*, 629 F.2d 269, 271 n.1 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981).

suitable vehicle for the Court to consider that question even if it had been properly raised below.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR ANY OTHER APPELLATE COURT

Even if the question addressed in the petition were properly presented in this case, Federal does not make any claim that the judgment below conflicts with any decision of this Court or any other court. Indeed, the very few appellate courts that have considered a similar claim of conflict with CERCLA have rejected it. *See, e.g., Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wash. 2d 869, 784 P.2d 507, 510 n.1 (1990); *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 799 P.2d 1253, 1262, 274 Cal. Rptr. 820 (1990).

III. FEDERAL'S CLAIM THAT THE JUDGMENT BELOW CONFLICTS WITH CERCLA IS WRONG

Federal's contention that the judgment requiring Federal to cover SBC's liability for CERCLA costs conflicts with the "polluter pays" principle of CERCLA is based not on any language of CERCLA, but entirely upon CERCLA's legislative history. Such an argument must fail. *E.g., United States v. Ron Pair Enterps., Inc.*, 489 U.S. 235, 241-42 (1989).

The text of CERCLA itself expressly permits responsible parties to obtain insurance to cover the costs to clean up environmental contamination. Thus, Section 107(e)(1) provides, in pertinent part, that "[n]othing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section." 42 U.S.C. § 9607(e)(1) (1990).[12] Indeed, Federal acknowledges that CERCLA

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[12] Courts also have interpreted § 107(e)(1) to allow the kind of insurance at issue here. *See, e.g., AM Int'l, Inc. v. International Forging Equip.*, 743 F. Supp. 525, 529 (N.D. Ohio 1990) ("by the

"does not in and of itself preclude insurance coverage . . ." (Pet. 10). *Compare* 42 U.S.C. §§ 9672(a), 9673(a).

Moreover, nothing in the legislative history cited by Federal contradicts the statute's express allowance of insurance coverage. *See* S. Rep. No. 848, 96th Cong., 2d Sess. (1980). Federal argues that the policy of CERCLA requires that the polluter pay for its actions through the payment of insurance premiums, and that the insurance policies which the courts below held covered SBC do not reflect the risks under CERCLA through the premiums charged, since those policies were issued prior to the enactment of CERCLA. But Federal misstates the policy of internalization of costs alluded to in the Senate report on CERCLA (but not mentioned in the statute). That policy was to preclude generators or others in the chain of waste production and disposal from shifting the risk of loss to each other or to the victims injured by the hazardous material. S. Rep. No. 848, 96th Cong., 2d Sess. 13, 15, 33 (1980). The report said nothing about shifting of the risk of loss to insurers, let alone whether the extent of the risk was reflected in the premiums charged.

In view of the language and history of CERCLA, it is quite understandable why EPA and the Justice Department have concluded that CERCLA "leaves the interpretation of insurance policies to state law," and that "[n]o special rules apply when construing insurance policies merely because the underlying liability arises as a result of CERCLA" (Fed. Reply Br. Exh. E. at 7).

In essence, Federal's argument boils down to the premise that it failed to anticipate the risks involved in covering pollution liability when underwriting pre-CERCLA

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second sentence [of 107(e)(1)], Congress intended to permit any person to contract with others not already liable under the act to provide additional liability by way of insurance or indemnity"), *appeal pending*, No. 90-3958 (6th Cir.).

policies, which risks it desires to shift back to SBC. Courts have rejected such shifting of the risk of loss from the insurer to the insured, on the basis that the insurers' failure to draft their policies to exclude such potential liability cannot be invoked "to the detriment of the insured who purchased a 'comprehensive general liability' policy." *Claussen v. Aetna Cas. & Sur. Co.*, 259 Ga. 333, 380 S.E.2d 686, 689 (1989). In any event, there is no evidence in the record on historical estimates of anticipated costs or any other information tending to show that Federal priced its policies in specific reliance upon its present interpretation of the narrow scope of coverage under its policies.

Federal's position amounts to a claim that, as a matter of public policy, CGL policies should not be allowed to cover past (or future) CERCLA costs. Responding to the same claim, the Supreme Court of California opined in *AIU*:

> [b]ecause Congress and the [state] Legislature already have made the relevant public policy determinations, the issue before this Court is not whether CGL policies *may* provide the coverage sought, but whether they do provide it according to their terms. [*AIU*, *supra*, 799 P.2d at 1262 (emphasis in original).]

The question whether Federal's policies "do provide [coverage of SBC] according to their terms" is governed by state law, is not presented by Federal's petition, and is not an issue for review by this Court. *E.g.*, *Bishop v. Wood*, 426 U.S. 341, 346-47 n.10 (1976); *Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967), *overruled on other grounds in Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

CONCLUSION

For all of the foregoing reasons, Federal's petition should be denied.

Respectfully submitted,

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